

148. Ferguson, PA
149. Ferndale, CA
150. Fiber-to-the-Home Council
151. Floral Park, **NY**
152. Florence, Kentucky
153. Florence, KY
154. Fort Worth, TX
155. Fortuna, CA
156. Foster City, CA
157. Foxboro Cable Access, MA
158. Franklin Lakes, NJ
159. Franklin, KY
160. Free Enterprise Fund
161. Free Press (Reply)
162. Free Press, Consumers Union, Consumer Federation of America
163. Freedomworks
164. Ft. Lauderdale, FL
165. Gainesville, FL
166. Garland, TX
167. Gamer, NC
168. Geneva, IL
169. Georgia Municipal Association (GMA)
170. Gibsonville, NC
171. Gilroy, CA
172. Glenview, IL
173. Graham, NC
174. Grand Rapids, MI
175. Granite Quarry, NC
176. Great Neck/North Shore Cable Comm'n, **NY**
177. Greater Metro Telecommunications Consortium, et al. (GMTC)
178. Green Spring, K
179. Greensboro, NC\*
180. Greenville, NC
181. Guilford County, NC
182. Hamett County, NC
183. Harris Township, PA
184. Haw River, NC
185. Hawaii Consumers
186. Hawaii Telcom Communications, Inc.
187. Henderson County, NC
188. Henderson, NV
189. Hialeah, FL
190. Hibbing Public Access TV, MN
191. High Point, NC
192. High Tech Broadband Coalition
193. Highlands, NC
194. Hillsborough, NC
195. Holly Springs, NC
196. Huntsville, AL
197. Imperial Beach, CA
198. Independent Multi-Family Communications Council

199. Indianapolis, IN
200. Institute **for** Policy Innovation
201. Intergovernmental Cable Comm Auth, MI
202. Iowa City, **IA**
203. Irvine, CA
204. Irwindale, CA
205. Itasca Comm TV, MN
206. Jackson, CA
207. Jamestown, NC
208. Jefferson County League of Cities Cable Comm'n, Kentucky
209. Jenkins, KY
210. Jersey Access Group, NJ
211. Kansas City, Missouri
212. Kenersville, NC
213. Killeen, TX
214. King County, WA
215. Kitty Hawk, NC
216. Knightdale, NC
217. La Puente, CA
218. Lake Forest, CA
219. Lake Lurie, NC
220. Lake Mills, WI
221. Lake Minnetonka Communications Comm, MN
222. Lake Worth, FL
223. Lakewood, CA
224. Las Vegas, NV
225. LaVerne, CA
226. League **of** Minnesota Cities (LMC)
227. League **of** United Latin American Citizens of the Northeast Region+
228. Leavenworth, KS
229. Lee County, FL
230. Leibowitz & Associates, **P.A.**
231. Lenexa, **KS**
232. Lewisville, NC
233. Lexington, NC
234. Lincoln, CA
235. Lincoln, NE
236. Long Beach, CA
237. Longmont, CO
238. Loomis, CA
239. Los Angeles Cable Televisión Access Corp., CA
240. Los Banos, CA
241. Lynwood, CA
242. Madison Hts, MI
243. Madison, NC
244. Madison, WI
245. Malveme, NY
246. Manatee County, Florida
241. Manhattan Community Access Corp., NY
248. Marin Telecomm Agency, CA
249. Martha's Vineyard Comm TV, MA

250. Maxton, NC
251. Mayodan, NC
252. Mayville, NY
253. Maywood, CA
254. Mecklenburg County, NC
255. Medford, OR
256. Medford, OR
257. Media Action Marin, CA
258. Media Bridges Cincinnati, OH
259. Mercatus Center
260. Metheun Comm TV, MA
261. Metropolitan Area Comm Comm'n, OR
262. Metropolitan Educational Access Corp, TN
263. Miami Valley Comm Council, OH
264. Miami-Dade County, Florida
265. Michigan Municipal League
266. Microsoft Corporation
267. Middlesex, NC
268. Midland, TX
269. Milpitas, CA
270. Minnesota Telecomm Alliance
271. Minority Media and Telecommunications Council, et al.
212. Missouri Chapter – National Association of Telecommunications Officers and Advisors (MO-NATOA)
273. Mobile, AL
274. Momeyer, NC
275. Monrovia, CA
216. Monterey Park, CA
277. Montrose, CO
278. Morrisville, NC
279. Mount Morris, MI
280. Mt. Hood Cable Regulatory Commission (MHCRC)
281. Murfreesboro, TN
282. Murfreesboro, NC
283. Murrieta, CA
284. National Association of Broadcasters
285. National Black Chamber of Commerce
286. National Cable & Telecommunications Association
281. National Caucus and Center on Black Aged
288. National Grange
289. National Hispanic Council on Aging
290. National Taxpayers Union
291. National Telecommunications Cooperative Association
292. NATOA, NLC, NACO, USCM, ACM, and ACD
293. Naval Media Center, US
294. New Jersey Board of Public Utilities (NJBPU)
295. New Jersey Division of the Ratepayer Advocate
296. New York City
291. New York State Conference of Mayors (NYCOM)
298. Newton Comm Access Cntr, MA
299. Norfolk, VA

300. North Kansas City, MO
301. North Liberty, IA
302. North Richland Hills, TX
303. Northbrook, IL
304. Northern Berkshire Comm TV Corp, MA
305. Northern ~~Dakota~~ County Cable Comm Comm'm
306. Northwest Suburbs Cable Commun Comm'n, MN
307. Norwalk, CA
308. Oceanside Comm TV, CA
309. Onslow Cnty, NC
310. Ontario, CA
311. Orange County, FL
312. Organization for the Promotion and Advancement of Small Telecommunications Companies
313. Orion Neighborhood TV, MI
314. Oxford, NC
315. Pacific Research Institute
316. Pac-West Telecomm, Inc.
317. Palmetto, FL
318. Palo Alto, CA (on behalf of Joint Powers)
319. Pasadena, CA
320. Patton, PA
321. Peachtree City, GA
322. Pennsville, NJ
323. Penis, CA
324. Philadelphia, PA
325. Pike County, Kentucky
326. Pike County, KY
327. Pikeville, Kentucky
328. Pikeville, KY
329. Pinetops, NC
330. Pittsboro, NC
331. Plainfield, MI
332. Pleasant Garden, NC
333. Pleasant Hill, CA
334. Plymouth, MA
335. Pocatello, ID
336. Post Falls, ID
337. Poway, CA
338. Prince George's Community TV, Inc.
339. Prince George's County, MD
340. Princeton Community TV, NJ
341. Public Cable Television Authority
342. Public Utility Commission of Texas
343. Public, Educational and Government Access Oversight Comm of Metro Nashville
344. Queen Anne's County, MD
345. Quote Unquote, NM
346. Qwest Communications International Inc.
347. Ramsey/Washington Counties Suburban Cable Commun. Comm'n, MN
348. Rancho Cordova, CA
349. Rancho Santa Margarita, CA
350. Randolph County, NC

351. RCN Telecom Services, Inc.
352. Red Oak, NC
353. Redding, CA
354. Reidsville, NC
355. Renton, WA
356. Richmond, KY
357. River Bend, NC
358. Rockingham County, NC
359. Rockwell, NC
360. Rolling Hills Estates, CA
361. Rowan County, NC
362. Sacramento Metro Cable TV Commission, CA
363. Saint Charles, MO
364. Salem, OR
365. Salt Lake City, UT
366. San Diego, CA
367. San Dimas, CA
368. San Jose, CA
369. San Juan Capistrano, CA
370. San Marcos, CA
371. San Mateo County Telecomm Auth, CA
372. Sanford, NC
373. Santa Clara, CA
374. Santa Clarita, CA
375. Santa Cruz County Community TV
376. Santa Rosa, CA
377. Santee, CA
378. Saratoga Springs, ~~NY~~
379. Scotts Valley, CA
380. Seattle, WA
381. Sebastopol, CA
382. Self-Advocacy Association of New York State, Inc
383. Shaler, PA
384. Sierra Madre, CA
385. Signal Hill, CA
386. Siler City, NC
387. Simi Valley, CA
388. Sjoberg's, Inc.
389. Skokie, IL
390. Smithfield, NC
391. Solana Beach, CA
392. South Orange Village, NJ
393. South Portland, ~~ME~~
394. South San Francisco, CA
395. South Slope Cooperative Telephone Company
396. Southeast Michigan Municipalities
397. Southwest Suburban Cable Commission (SWSCC)
398. Spring Hope, NC
399. Springfield, MO
- 400.** St. Charles, IL
401. St. Paul, MN\*

402. St. Petersburg, FL
403. Standish, **ME**
404. State College Borough, PA
405. State of Hawaii
406. Statesville, NC
407. Sun Prairie Cable Access TV, WI
408. Sunapee, **NH+**
409. Sunnyvale, CA
410. Susanville, CA
411. Tabor City, NC
412. Tampa, FL
413. Taylor, MI
414. Telco Retirees Association, Inc.
415. Telecommunications Industry Association
416. Temecula, CA
417. Texas Coalition of Cities for Utility Issues (TCCFUI)
418. Texas Municipal League and the Texas City Attorneys Association
419. The Progress & Freedom Foundation
420. Time Warner Cable
421. Tobaccoville, NC
422. Toppenish, WA
423. Torrance, CA
424. Truckee, CA
425. Tulsa, OK
426. Tuolumne, CA
427. Ukiah, CA
428. United States Internet Industry Association
429. United States Telecom Association
430. United States-Mexico Chamber of Commerce
431. URTV Asheville, NC
432. Valley Voters Organized Toward Empowerment
433. Vancouver Educational Telecommunications Consortium (VETC)
434. Vass, NC
435. Verizon
436. Vermont Public Service Board (VPSB)
437. Video Access Alliance
438. Villages of Larchmont & Mamaroneck, **NY**
439. Virginia Cable Telecommunications Association (VCTA)
440. Vista, CA
441. Wake Forest, NC
442. Walnut Creek, CA
443. Walnut Creek, California
444. Warrenville, IL
445. Washington State Grange
446. Wayland, MA
447. Wendell, NC
448. West Allis, WI
449. West Palm Beach, FL
450. Westport, WI
451. Wheaton, IL
452. Whitakers, NC

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- 453. White Plains Cable Access TV, NY
  - 454. White, SD
  - 455. Whittier, CA
  - 456. Wilbraham, MA
  - 457. Wilson, NC
  - 458. Winchester, KY & KY Regional Cable Comm.
  - 459. Windham Community TV, NH
  - 460. Winston-Salem, NC
  - 461. Wisconsin Association of Public, Educational and Government Access Channels (WAPC)
  - 462. Women Impacting Public Policy
  - 463. Worcester, MA
  - 464. World Institute on Disability
  - 465. Yanceyville, NC
  - 466. Yuma, AZ
  - 467. Zebulon, NC
  - 468. Zeeland, MI

## APPENDIX B

**Rule Changes**

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

## Part 76–MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. Revise Subpart C title to read as follows:

## Subpart C –Cable Franchise Applications

2. Insert into new Subpart C the following:

**§76.41 Franchise Application Process**

(a) Definition. *Competitive Franchise Applicant.* For the purpose of this section, an applicant for a cable franchise in an area currently served by another cable operator or cable operators in accordance with 47 U.S.C. § 541(a)(1).

(b) A competitive franchise applicant must include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws:

- (1) the applicant's name;
- (2) the names of the applicant's officers and directors;
- (3) the business address of the applicant;
- (4) the name and contact information of a designated contact for the applicant;
- (5) a description of the geographic area that the applicant proposes to serve;
- (6) the PEG channel capacity and capital support proposed by the applicant;
- (7) the term of the agreement proposed by the applicant;
- (8) whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area as described under subsection (b)(5);
- (9) the amount of the franchise fee the applicant offers to pay; and
- (10) any additional information required by applicable state or local laws

(c) A franchising authority may not require a competitive franchise applicant to negotiate or engage in any regulatory or administrative processes prior to the filing of the application.

(d) When a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.



e) If a franchising authority does not grant or deny an application within the time limit specified in subsection (d), the competitive franchise applicant will be authorized to offer service pursuant to an interim franchise in accordance with the terms of the application submitted under subsection (h).

f) If after expiration of the time limit specified in subsection (d) a franchising authority denies an application, the competitive franchise applicant **must** discontinue operating under the interim franchise specified in subsection (e) unless the franchising authority provides consent for the interim franchise to continue for a limited period of time, such as during the period when judicial review of the franchising authority's decision is pending. The competitive franchise applicant may seek judicial review of the denial under 47 U.S.C. § 555.

g) If after expiration of the time limit specified in subsection (d) a franchising authority and a competitive franchise applicant agree on the terms of a franchise, upon the effective date of that franchise, that franchise will govern and the interim franchise will expire.

## APPENDIX C

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the “RFA”),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact of the policies and rules proposed in the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) on a substantial number of small entities? Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided in paragraph 145 of the item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>3</sup> In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>4</sup>

A. Need for, and Objectives of, the Proposed Rules

2. The *Further Notice* continues a process to implement Section 621(a)(1) of the Communications Act of 1934, as amended, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment as discussed in the *Report and Order* (“*Order*”). Specifically, the *Further Notice* solicits comment on whether the Commission should apply the rules and guidelines adopted in the *Order* to cable operators that have existing franchise agreements, and if so, whether the Commission has authority to do so. The *Further Notice* also seeks comment on whether the Commission can preempt state or local customer service laws that exceed Commission standards.

B. Legal Basis

3. The *Further Notice* tentatively concludes that the Commission has authority to apply the findings in the *Order* to cable operators with existing franchise agreements. In that regard, the *Further Notice* finds that neither Section 611(a) nor Section 622(a) distinguishes between incumbents and new entrants or franchises issued to incumbents and franchises issued to new entrants?

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted? The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the

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<sup>1</sup> The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *See* 5 U.S.C. § 603. Although we are conducting an IRFA at this stage in the process, it is foreseeable that ultimately we will certify this action pursuant to the RFA, 5 U.S.C. § 605(b), because we anticipate at this time that any rules adopted pursuant to this *Notice* will have no significant economic impact on a substantial number of small entities.

<sup>3</sup> *See* 5 U.S.C. § 603(a).

<sup>4</sup> *See* 5 U.S.C. § 603(a).

<sup>5</sup> *See* 47 U.S.C. §§ 531(a), 542(a).

<sup>6</sup> 5 U.S.C. § 603(b)(3).

<sup>7</sup> 5 U.S.C. § 601(6).

same meaning as the term “small business concern” under the Small Business Act.<sup>8</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).<sup>9</sup>

5. **Small Businesses.** Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.”

6. **Small Organizations.** Nationwide, there are approximately 1.6 million small organizations.”

7. The Commission has determined that the group of small entities possibly directly affected by the proposed rules herein, if adopted, consists of small governmental entities. A description of these entities is provided below. In addition the Commission voluntarily provides descriptions of a number of entities that may be merely indirectly affected by any rules that result from the *Further Notice*.

#### Small Governmental Jurisdictions

8. The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>12</sup> As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.<sup>13</sup> This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

#### Miscellaneous Entities

9. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our tentative conclusions.

#### Cable Operators

10. The “Cable and Other Program Distribution” census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating \$13.0 million or **less** in revenue annually.” According to Census Bureau data for 1997, there were a total of

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<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a **small** business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>9</sup> 15 U.S.C. § 632.

<sup>10</sup> See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

<sup>11</sup> Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

<sup>12</sup> 5 U.S.C. § 601(5).

<sup>13</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

<sup>14</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) 517510.

1,311 firms in this category, total, that had operated for the entire year.<sup>15</sup> Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

11. **Cable System Operators (Rate Regulation Standard).** The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>16</sup> The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.<sup>17</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

12. **Cable System Operators (Telecom Act Standard).** The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>18</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.<sup>19</sup> Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>20</sup> Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.<sup>21</sup> The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>22</sup> and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

13. **Open Video Services.** Open Video Service ("OVS") systems provide subscription services.<sup>23</sup> As noted above, the SBA has created a small business size standard for Cable and Other

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<sup>15</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

<sup>16</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. See *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

<sup>17</sup> Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

<sup>18</sup> 47 U.S.C. § 543(m)(2).

<sup>19</sup> See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

<sup>20</sup> 47 C.F.R. § 76.901(f).

<sup>21</sup> See FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

<sup>22</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

<sup>23</sup> See 47 U.S.C. § 573.

Program Distribution.”<sup>24</sup> This standard provides that a small entity is one with \$13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.<sup>25</sup> Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

14. We anticipate that any rules that result from this action would have at most a *de minimis* impact on small governmental jurisdictions (e.g., one-time proceedings to amend existing procedures regarding the method of granting competitive franchises). Local franchising authorities (“LFAs”) today must review and decide upon competitive cable franchise applications, and will continue to perform that role upon the conclusion of this proceeding; any rules that might be adopted pursuant to this Notice likely would require at most only modifications to that process.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”<sup>26</sup>

16. As discussed in the *Further Notice*, Sections 611(a) and 622(a) do not distinguish between new entrants and cable operators with existing franchises.” As discussed in the *Order*, the Commission has the authority to implement the mandate of Section 621(a)(1) to ensure that LFAs do not unreasonably refuse to award competitive franchises to new entrants, and adopts rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry for new entrants. Such rules consist of specific guidelines (e.g., maximum timeframes for considering a competitive franchise application) and general principles regarding franchise fees designed to provide LFAs with the guidance necessary to conform their behavior to the directive of Section 621(a)(1). As noted above, applying these rules regarding the franchising process to cable operators with existing franchises likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, we believe that the interest of fairness to those cable operators would outweigh any impact on small entities. The alternative (i.e., continuing to allow LFAs to follow procedures that are unreasonable) would be unacceptable, as it would be inconsistent with the Communications Act. We seek comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. We also invite comment on ways in which

<sup>24</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>25</sup> See <http://www.fcc.gov/mb/ovs/csovsccr.html> (visited December 19, 2006), <http://www.fcc.gov/mb/ovs/csovsarc.html> (visited December 19, 2006).

<sup>26</sup> 5 U.S.C. §§ 603(c)(1)-(4).

<sup>27</sup> 47 U.S.C. §§ 531(a), 542(a).

the Commission might implement the tentative conclusions while at the same time imposing lesser burdens on small entities.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

**17. None.**

## APPENDIX D

## Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice & Proposed Rulemaking* (“NPRM”) to this proceeding? The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

A. Need for, and Objectives of, the Report and Order

2. This Report and Order (“**Order**”) adopts rules and provides guidance to implement Section 621 of the Communications Act of 1934, as amended (the “Communications Act”).<sup>4</sup> Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services? The Commission has found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impedes enhanced cable competition and accelerated broadband deployment. The Commission also has determined that it has authority to address this problem. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, in this **Order** the Commission (1) adopts maximum time frames within which local franchising authorities (“LFAs”) must grant or deny franchise applications (90 days for new entrants with existing access to rights-of-way and six months for those who do not); (2) prohibits LFAs from imposing unreasonable build-out requirements on new entrants; (3) identifies certain costs, fees, and other compensation which, if required by LFAs, must be counted toward the statutory 5 percent cap on franchise fees; (4) interprets new entrants’ obligations to provide support for PEG channels and facilities and institutional networks (“I-Nets”); and (5) clarifies that LFA authority is limited to regulation of cable services, not mixed-use services. The Commission also preempts local laws, regulations, and franchise agreement requirements, including level-playing-field provisions, to the extent they impose greater restrictions on market entry for competitive entrants than what the **Order** allows. The rule and guidelines are adopted in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. For the specific language of the rule adopted, see Appendix B.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, Sjoberg’s, Inc. submitted a comment that specifically responded to the IRFA. Sjoberg’s, Inc. contends that small cable operators are directly affected by the adoption of rules that treat competitive cable entrants more favorably than incumbents. Sjoberg’s Inc. argues that small cable operators are not in a position to compete with large potential competitors. These arguments were considered and rejected as discussed below.

4. We disagree with Sjoberg’s Inc. assertion that our rules will treat competitive cable entrants more favorably than incumbents. While the actions we take in the **Order** will serve to increase

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>2</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581 (2005) (“NPRM”).

<sup>3</sup> See 5 U.S.C. § 604

<sup>4</sup> 47 U.S.C. § 541(a)(1)

<sup>5</sup> *Id.*

competition in the multichannel video programming (“MVPD”) market, we do not believe that the rules we adopt in the **Order** will put any incumbent provider at a competitive disadvantage. In fact, we believe that incumbent cable operators are at a competitive advantage in the MVPD market; incumbent cable operators have the competitive advantage of an existing customer base and significant brand recognition in their existing markets. Furthermore, we ask in the *Further Notice of Proposed Rulemaking* whether the findings adopted in the **Order** should apply to existing cable operators and tentatively conclude that they should.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Entities Directly Affected By Proposed Rules

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>6</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>8</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>9</sup>

6. The rules adopted by this **Order** will streamline the local franchising process by adopting rules that provide guidance as to what constitutes an unreasonable refusal to grant a cable franchise. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this FRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Small governmental jurisdictions.* Small governmental jurisdictions are “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.” This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

<sup>6</sup> 5 U.S.C. § 603(b)(3)

<sup>7</sup> *Id.* § 601(6)

<sup>8</sup> *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “bless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>9</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>10</sup> 5 U.S.C. § 601(5).

<sup>11</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.



### Miscellaneous Entities

8. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our conclusions.

### Cable Operators

9. The “Cable and Other Program Distribution” census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating \$13.0 million or less in revenue **annually**.<sup>12</sup> According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire **year**.<sup>13</sup> Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

10. Cable System Operators (Rate Regulation Standard). The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission’s rules, a “small cable company” is one serving fewer than 400,000 subscribers nationwide.<sup>14</sup> The most recent estimates indicate that there were 1,439 cable operators who qualified **as** small cable system operators at the end of 1995.<sup>15</sup> Since then, some **of** those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

11. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed **\$250,000,000**.”<sup>16</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.” Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues **of** all its affiliates, do not exceed \$250 million in the **aggregate**.<sup>18</sup> Based on available data, the Commission estimates that the

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13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

<sup>13</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 513220 (issued October 2000).

<sup>14</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

<sup>15</sup> Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995)

<sup>16</sup> 47 U.S.C. § 543(m)(2).

<sup>17</sup> *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

47 C.F.R. § 76.901(f).

number of cable operators serving **677,000** subscribers or fewer, totals **1,450**.<sup>19</sup> The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>20</sup> and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of **1934**.

**12.** Open Video Services. Open Video Service (“OVS”) systems provide subscription services.<sup>21</sup> As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.” This standard provides that a small entity is one with \$13.0 million or less in annual receipts. The Commission has certified approximately **25** OVS operators to serve 75 areas, and some of these are currently providing service? Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to **24** OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

#### Telecommunications Service Entities

**13.** As noted above, a “small business” under the RFA is one that, *infer alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>24</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>25</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

**14.** Incumbent *Local Exchange Carriers* (“LECs”). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>26</sup> According to

<sup>19</sup> See FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

<sup>20</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

<sup>21</sup> See 47 U.S.C. § 573.

<sup>22</sup> 13C.F.R. § 121.201, NAICS code 517510.

<sup>23</sup> See <http://www.fcc.gov/mb/ovs/csovsccer.html> (visited December 19, 2006), <http://w.fcc.gov/mb/ovs/csovsarc.html> (visited December 19, 2006).

<sup>24</sup> 15 U.S.C. § 632.

<sup>25</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>26</sup> 13C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002)

Commission data,” 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>28</sup>

15. **Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>29</sup> According to Commission data,<sup>30</sup> 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are “Shared-Tenant Service Providers,” and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are “Other Local Service Providers.” Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>31</sup>

**D. Description of Projected Reporting, Record Keeping and other Compliance Requirements**

16. The rule and guidance adopted in the *Order* will require *de minimus* additional reporting, record keeping, and other compliance requirements. The most significant change requires potential franchisees to file an application to mark the beginning of the franchise negotiation process. This filing requires minimal information, and we estimate that the average burden on applicants to complete this application is one hour. The franchising authority will review this application in the normal course of its franchising procedures. The rule will not require any additional special skills beyond any already needed in the cable franchising context.

**E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered**

17. The RFA requires an agency to describe any significant alternatives that it has considered

<sup>27</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (June 2005) (“Trends in Telephone Service”). This source uses data that are current as of October 1, 2004.

<sup>28</sup> See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 20,815 to 27,891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

<sup>29</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>30</sup> “Trends in Telephone Service” at Table 5.3

<sup>31</sup> See *supra* note 28

in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, **or** simplification of compliance **or** reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities?'

18. In the *NPRM*, the Commission sought comment on the impact that rules interpreting Section 621(a)(1) might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invited comment on ways in which the Commission might implement Section 621(a)(1) while at the same time impose lesser burdens on small entities. The Commission tentatively concluded that any rules likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the establishment of specific guidelines for LFAs with respect to the process by which they grant competitive cable franchises. We agree with those tentative conclusions, and we believe that the rules adopted in the **Order** will not impose a significant impact on any small entity.

19. In the **Order**, we provide that LFAs should reasonably review franchise applications within 90 days for entities existing authority to access rights-of way, and within six months **for** entities that do not have such authority. This will result in decreasing the regulatory burdens on cable operators. We declined to adopt shorter deadlines that commenters proposed (*e.g.*, 17 days, one month) in order to provide small entities more flexibility in scheduling their franchise negotiation sessions. In the **Order**, we also provide guidance on whether an LFA may reasonably refuse to award a competitive franchise based on certain franchise requirements, such **as** build-out requirements and franchise fees. As an alternative, we considered providing no guidance on any franchising terms. We conclude that the guidance we provide minimizes any adverse impact on small entities because it clarifies the terms within which parties must negotiate, and should prevent small entities from facing costly litigation over those terms.

#### F. Report to Congress

20. The Commission will send a copy of the **Order**, including this FRFA, in a report to be sent to Congress pursuant to the *Small Business Regulatory Enforcement Fairness Act of 1996*.<sup>33</sup> In addition, the Commission will send a copy of the **Order**, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the **Order** and FRFA (or summaries thereof) will also be published in the Federal Register?'

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<sup>32</sup> 5 U.S.C. § 603(c)(1)-(c)(4)

<sup>33</sup> See 5 U.S.C. § 801(a)(1)(A)

<sup>34</sup> See *id.* § 604(b).

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)*

Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal of federal communications policy. In passing the 1992 Cable Act Congress recognized that competition between multiple cable systems would be beneficial, would help lower cable rates, and specifically encouraged local franchising authorities to award competitive franchises. Section 621 of the statute reads, "A franchising authority may not grant an exclusive franchise and ~~may~~ not unreasonably refuse to award an additional competitive franchise."

Telephone companies are investing billions of dollars to upgrade their networks to provide video. As new providers began actively seeking entry into video markets, we began to hear that some local authorities were making the process of getting franchises unreasonably difficult, despite clear statutory language. The record collected by the Commission in this proceeding cited instances where LFAs sat on applications for more than a year or required extraordinary in kind contributions such as the building of public swimming pools and recreation centers.

Such unreasonable requirements are especially troubling because competition is desperately needed in the video market. As we just found, from 1995 to 2005, cable rates have risen 93%. In 1995 cable cost \$22.37 per month. Last year, cable cost \$43.04 per month. Today's Communications Daily reports that prices for expanded basic are now about **\$50** per month. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service have declined while cable rates have risen year after year after year.

This item appropriately removes such regulatory barriers by giving meaning to the words Congress wrote in section 621 of the Cable Act. Specifically, the Commission finds that an LFA is unreasonably refusing to grant a competitive franchise when it does not act on an application within a reasonable time period, imposes taxes on non-cable services such as broadband, requires a new entrant to provide unrelated services or imposes unreasonable build-out requirements.

The widespread deployment of broadband remains my top priority as Chairman and a major Commission objective. During my tenure as Chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms. And we have begun to see some success as a result of the Commission's policies. High-speed connections to the Internet have grown over 400% since I became Commissioner in July 200.

The ability to deploy broadband networks rapidly however, is intrinsically linked to the ability to offer video to consumers. As the Commission stated in the Notice in this proceeding: "The construction of modern telecommunications facilities requires substantial capital investment and such networks, once completed, are capable of providing not only voice and data, but video as well. As a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered."

Similarly, in a 2005 Policy Paper, the Phoenix Center found that video is "is now the key driver for new fiber deployment in the residential market." The Phoenix Center went on to say that: "If a new

entrant cannot readily provide consumers multichannel video over an advanced network, then the prospects for success will be diminished substantially due to a reduction in the entrant's potential revenues. Quite simply, the ability to sell video services over these fiber networks may be a crucial factor in getting those fiber networks deployed.” By enhancing the ability of new entrants to provide video services then we are advancing our goal of universal affordable broadband access for Americans, **as** well as our goal of increased video competition.

I am also committed to seeing that consumers are able to realize the benefits of competition in the forms of better services and lower prices. In recent years however, consumers have had limited choice among video services providers and ever increasing prices for those services. But as was just demonstrated in our annual price survey, cable competition can impact cable bills. Again, it found that only in areas where there was competition from a second cable operator did average price for cable service decrease. I **am** pleased that the steps taken by the Commission today will expressly further this type of competition and help ensure that lower prices are available to as many Americans as possible as quickly as possible.

Addressing build-out requirements was particularly difficult. This item seeks to strike a balance between encouraging as widespread deployment of broadband as possible while not deterring entry altogether. I believed it would have been appropriate to provide examples of build-out requirements that would be reasonable in addition to illustrating those that could not be.’

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<sup>1</sup> For example, I would have been willing to find that it would seem reasonable for **an LFA** to require that, beginning five years after the effective date of a new entrant's franchise and every 3 years thereafter, if in the portion of the franchise area where the new entrant **has** chosen to offer cable service at least 15 percent of the households subscribe to such service, the new entrant increase by **20** percent the households in the franchise area to which the new entrant offers cable service by the beginning of the next 3-year interval, until the new entrant is capable of providing cable service to all households in the franchise area.

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

**Re:** *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)*

I think that all of my colleagues and I can agree on the central importance of encouraging video competition. It is abundantly clear that cable rates are rising faster than inflation and that wireline cable competition can be helpful in bringing those rates down. Consumers deserve rules that will bring such competition to their doorsteps because consumers are not being well-served by the lack of competition today.

I think my colleagues and I can also agree on the central importance of broadband deployment. **As I** have often pointed out, our nation is falling behind in the international broadband race. Encouraging new entrants into the video market could at least assist in the challenge of building out broadband infrastructure, although it doesn't represent anything near the totality of what a real broadband strategy would look like.

But agreeing on the many benefits of video competition is hardly the same thing as coming **up** with rules that will actually encourage honest-to-goodness competition within the framework of the statutes that Congress has given us. The item before **us** today doesn't get **us** there and **I** cannot support it as written.

In recent days we had discussions attempting to craft an item with which **I** would feel more comfortable. Chairman Martin engaged in those discussions in good faith and I thank him for that. My goal was to encourage an item that preserves a local authority's statutory right to seek specific and far-reaching build-out requirements, protects each community's ability to negotiate for **PEG** and I-NET facilities, and maintains truly meaningful local ability to deal with the huge companies that are coming into our cities and towns to build important infrastructure.

Throughout the consideration of this item and even as we discussed ways to improve it in recent days, I have been troubled at the lack of a granular record that would **demonstrate** that the present franchising system is irretrievably broken and that traditional federal-state-local relationships have to be so thoroughly upended. If we are going to preempt and upend the balances inherent in long-standing federal-state-local jurisdictional authorities, we should have a record clearly demonstrating that those local authorities are not up to the task of handling this infrastructure build-out and that competition can be introduced only by preempting and upsetting these long-standing principles of federalism. My colleagues may recall that when we launched the NPRM on this item, I made it very clear how important the compilation of a compelling granular record would be in my consideration of this proceeding. I do not believe that either today's item or the record behind it makes such a showing. The various examples of "unreasonable" franchise requirements that the item enumerates are not closely or carefully supported by the record and often fail to rise beyond isolated episodes or anecdotal evidence.

Many people questioned, and continue to question, the Commission's legal authority to do what it is doing today. It is clear that those questions remain and that the Commission has been asked by those with oversight powers to more conclusively demonstrate our authority to undertake the actions we initiate today. I believe it is the better course of wisdom in so far-reaching a proceeding, in light of the concern being expressed **by** those with oversight responsibilities of this Commission, to thoroughly answer those questions, to lay out the basis of our claimed legal authority, and to explain what legal risks this action entails before taking action. Under the circumstances, proceeding on such a controversial decision today

does not put an end to this issue. It only invites more delay, more confusion, and more possibility of legal challenge.

**As** we face the challenge of providing ubiquitous high-speed broadband to all our citizens, we need the certainty of a national strategy to get the job done. Right now this nation is hobbled because it has no such strategy, no plan for the infrastructure build-out our people need to be productive and competitive citizens of the world. The United States is ranked number twenty-one in the International Telecommunications Union's Digital Opportunity Index. It is difficult to take much comfort **from** being twenty-first in the Twenty-first century. The kind of broadband strategy I am talking about demands a level of consensus and national buy-in by the many diverse interests and entities that would be responsible for implementing it. While I have never equated franchise reform as anything remotely equivalent to a national broadband strategy, I do believe a properly-crafted and legally-certain franchising reform could facilitate some level of broadband build-out. That is what I attempted to work toward here. But if our decision is only going to increase concern, increase the questions and increase the risk, then I think we should pause, take a deep breath, answer the questions and reach out for more consensus. I don't say unanimity, of course, but at least a level of comfort that builds an environment wherein the next few years can see the job actually getting done rather than spent in contentious debate or court challenge because our reasoning was deemed inadequate.

**So** I thank my colleagues, and especially the Chairman, for the discussions we have had—discussions that were both in good faith and substantive—but in light of the concerns I have just discussed, I cannot support this afternoon's outcome. Unlike so many other proceedings coming before the Commission, I was nowhere near certain **as** I came to work this morning how the vote on this item would go. I actually thought that perhaps **we** would take the short time needed, answer the questions that had been posed, and then reassess where we were **as** to proceeding with an item. That was my preference. Instead it appears a majority will proceed to approve an item that, as drafted right now, is without important enhancements I have been advocating and without sufficient buy-in from the world beyond the FCC to **assure** its effectiveness. I must therefore respectfully dissent.



DISSENTING STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN

***Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)***

The policy goals of this **Order**, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, today's item goes **out** on a limb in asserting federal authority to preempt local governments, and then saws off the limb with a highly dubious legal scheme. It substitutes our judgment as to what is reasonable – or unreasonable – for that of local officials – all in violation of the franchising framework established in the Communications Act.

Today's **Order** is certain to offend many in Congress, who worked long and hard on this important issue, only to have a Commission decision rushed through with little consultation. The result will be heavy oversight after-the-fact, and a likely rejection by the courts. It will solve nothing, create much confusion, and provide little certainty or progress on our shared goal of promoting real video competition and universal broadband deployment.

This outcome is disappointing because I believe we must do everything we can to encourage competitive video offerings. **As** I was driving to work this morning, I saw a line of Verizon trucks installing FiOS in my neighborhood. I must admit, I am very excited about this new service, and plan to subscribe. FiOS is now available because our local county officials approved a franchise for Verizon. If they had not, I imagine many of my neighbors would have complained loudly. Maybe that is why Verizon has repeatedly told Wall Street investors, “[e]ven in those states where we don’t have the whole state, places like Pennsylvania, we have become very successful now in getting franchising. So we don’t see that as an issue going forward.” I am pleased with their efforts and their success, and want to encourage their continued investment.

**As** I said in the underlying **Notice of Proposed Rule Making**, ‘Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992.’<sup>2</sup> I agree the Commission should do what it can within the current legal framework to facilitate increased video competition because it benefits American consumers, promotes U.S. deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society.

Notwithstanding these worthy goals, I, unfortunately, cannot support this **Order** because the FCC is a regulatory agency, not a legislative body. In my years working on Capitol Hill, I learned enough to know that today's **Order** is legislation disguised as regulation. The courts will likely reverse such action because the Commission cannot act when it “does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen.... This extensive quasi-legislative effort to implement the statute does not strike [me] as merely a construction of statutory phrases.”

<sup>1</sup> **Final Transcript**, Thomson StreetEvents, VZ-Verizon at UBS 34<sup>th</sup> Annual Global Media Conference, Dec. 6, 2006, at page 7, available at, [http://investor.verizon.com/news/20061206/20061206\\_transcript.pdf](http://investor.verizon.com/news/20061206/20061206_transcript.pdf).

<sup>2</sup> Statement of Commissioner Jonathan S. Adelstein, **Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992**, MB Docket No. 05-311, Notice of Proposed Rulemaking, FCC 05-180 (rel. Nov. 18, 2005) (“**Local Franchising NPRM**”).

<sup>3</sup> *Kelley v. E.P.A.*, 15 F.3d 1100, 1108 (DC. Cir. 1994). While the Commission contends that “[d]espite the parameters established by the Communications Act, ... operation of the franchising process has proven far **more** (continued...) ”